United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2259

To be argued by
DOUGLAS S. DALES, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2259

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CAMILLUS WEST HOMEOWNER'S ASSN., INC., Individually, and on behalf of all those entitled to the use and enjoyment of the environment and natural resources of the Town of Camillus, New York, and all others similarly situated,

Plaintiff,

- against -

CLAUDE S. BRINEGAR, Individually, and as Secretary of Transportation of the United States,

Defendant,

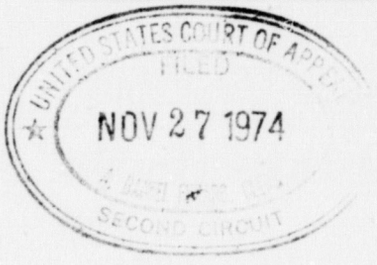
and

RAYMOND T. SCHULER, Individually, and as Commissioner of the Department of Transportation, State of New York,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT SCHULER



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BRIEF FOR DEFENDANT-APPELLANT SCHULER

PRELIMINARY STATEMENT

This is an appeal by the defendant Raymond T. Schuler, New York State Commissioner of Transportation, from an order of Honorable Edmund Port, United States District Judge for the Northern District of New York, dated July 24, 1974, which

denied a motion to modify a permanent injunction barring federal funding of a federal-aid highway project where, by stipulation, all parties had agreed to such modification.

ISSUE PRESENTED

Did the District Court abuse its discretion when it refused to modify a permanent injunction which it previously had granted when all parties had agreed to the modification?

DECISION BELOW

The District Court, after hearing oral argument on July 22, 1974, dictated its decision on the record denying the appellant's motion for modification. An order was entered on July 24, 1974.

STATEMENT OF THE CASE

Plaintiff is an incorporated association of homeowners in the Town of Camillus, New York, which challenged the State and Federal defendants' purported non-compliance with federal laws concerning environmental protection in connection with a highway project in Onondaga County known popularly as the Camillus By-Pass.

Defendant Schuler is Commissioner of Transportation of the State of New York. As head of the New York State Department of Transportation (NYDOT), he is responsible for the State's highway programs. Defendant Brinegar is Secretary of the United States Department of Transportation, responsible for the federal-aid highway programs through the Federal Highway Administration (FHWA).

The project at issue originates at the intersection of Routes 5 and 173, moves westerly and to the north of Route 5 about five miles, and terminates at a point just west of the Village of Camillus. The complaint (1-20)* alleged that the defendants had failed to comply with the hearing requirements of the Federal Aid Highway Act, 23 U.S.C., §128, and the environmental impact statement requirement of the National Environmental Policy Act, 42 U.S.C., §4321, et seq. A permanent injunction was granted (60), after a hearing on February 7, 1974, as follows:

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*References are to pages of Joint Appendix.

"ORDERED, that defendant Brinegar shall in all respects comply with the requirements of Section 102 of the National Environmental Policy Act (42 U.S.C. §4332(2)(c)); and it is further

"ORDERED, that defendant Schuler shall in all respects comply with the requirements of Section 128 of the Federal Aid Highway Act (23 U.S.C. §128); and it is further

"ORDERED, that defendant Brinegar, his successors, agents, servants and employees and defendant Schuler, and his respective successors, agents, servants and employees be and they hereby are enjoined and restrained, as of the date of this order, from disbursing or receiving any further federal funds either for construction or materials, heretofore or hereafter provided, with respect to PIN 3033.10 until the court, after proper hearing on notice, is satisfied that this order has been complied with."

Since the date of the order, March 20, 1974, construction was suspended and all necessary steps taken to protect the environment and the public. Commissioner Schuler determined at that time that it would be economically imprudent to proceed with the project without federal financial participation.

During the period from March 20, 1974 to July 21, 1974, negotiations continued between the plaintiff, the New York State Department of Transportation, the Federal Highway Administration and other interested persons. It appeared to be the consensus of the parties to such negotiations that the timely completion of the Camillus By-Pass project would best serve the interests of the communities involved and the residents thereof.

Accordingly, an agreement between the parties to the litigation was reached and reduced to the form of a stipulation (72-76). Briefly, the stipulation provided that a separate proposed federal-aid project would be initiated for the bridging of Rolling Hills Road at its intersection with the By-Pass, that the planned service road connecting Old North Street to Rolling Hills Road would be extended to connect with Maple Drive at its intersection with the By-Pass and that several minor design changes at the westerly terminus would be effectuated to provide greater safety in the area of Ike Dixon Road. It further provided, subject to the approval of the Court, that the project might be progressed with federal-aid funds while federal hearing and environmental impact statement requirements were being met in connection with the proposed bridging of Rolling Hills Road. The stipulation was fully executed on July 22, 1974.

Based upon the stipulation which had been agreed upon, a motion was made by defendant Schuler, pursuant to FRCP, Rule 60(b), to modify the March 20, 1974 order, quoted supra, to delete the final decretal paragraph, in order to permit federal financial participation in the project (68).

On the return date of the motion, July 22, 1974, all parties to the action appeared and urged the modification upon the Court (81-83).

Notwithstanding this unanimity, however, the District Judge refused to modify his prior order. This refusal, it is submitted, constituted an abuse of his discretion under the circumstances of this case.

Subsequent to this refusal, the Governor ordered the project to be resumed with State funds, and further ordered Commissioner Schuler to proceed expeditiously with the Court's requirements concerning an environmental impact statement and additional hearings.

ARGUMENT

THE DISTRICT COURT'S REFUSAL TO MODIFY ITS PRIOR ORDER ENJOINING FEDERAL FUNDING CONSTITUTED AN ABUSE OF DISCRETION.

This appeal, as noted, is taken from the denial of a motion by appellant Schuler, brought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, which sought to modify a permanent injunction barring the use of federal funds in connection with a federal-aid highway project, based upon a stipulation between the parties. The denial of that motion is unquestionably a final order and, thus, appealable. Greenspahn v. Joseph E. Seagram & Sons, 186 F. 2d 616 (2d Cir. 1951). The scope of review on appeal, however, is limited to determining whether the District Court's action constituted an abuse of discretion. Brennan v. Midwestern United Life Insurance Co., 450 F. 2d 999, cert. denied 405 U.S. 921 (7th Cir. 1973); 7 Moore's Federal Practice ¶ 60.19.

Central to a determination of this single question on appeal is an understanding of the intended effect of the motion to modify. Basically, relief was sought which would have permitted the project to proceed at the same time that federal hearing and environmental requirements were being met. Other federal courts in environmental cases have permitted this approach.

Thus, in Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338, aff'd 477 F. 2d 1033 (8th Cir. 1973), the Army Corps of Engineers was permitted to continue construction of a flood control project along the Osage, Mississippi and Missouri Rivers, pending completion of an EIS. Factors taken into account were minimal environmental damage and independent economic benefit.

In Jones v. Lynn, 354 F. Supp. 433, rev'd 477 F. 2d 885 (1st Cir. 1973), the Court of Appeals granted an injunction after the District Judge had refused such relief, but nevertheless authorized the District Judge to release the injunction:

> "a. As to those parcels where completion is near or where such binding committments to a specific structure and purpose have been made that changes in purpose, structure, or timing would work substantial injustice or public harm, the burden being on the defendants."

This Court, in Greene County Planning Board v. FPC, 455 F. 2d 412, cert. denied 409 U.S. 849 (2d Cir. 1972), enjoined a part of the Blenheim-Gilboa pumped power storage project, pending compliance with NEPA, but refused injunctive relief as to two transmission lines under construction which were 80% complete.

Finally, in ECOS v. Volpe, ___ F. Supp. ___, 5 ERC 1019, aff'd 486 F. 2d 1399, 5 ERC 2024 (4th Cir. 1973), the plaintiffs sought to enjoin construction of 9.2 miles of controlled access

highway running through Durham, North Carolina, claiming that only a draft EIS had been prepared. A 1.7 mile segment had already been completed and opened to traffic. A 1.9 mile segment was scheduled to be completed within a month after the suit was filed. An 0.8 mile segment had been under construction for three months to be completed within two years. The remaining segments were in various stages of preliminary design, although some right of way had been acquired. The court did require compliance with NEPA and the expanded hearing aspects of 23 U.S.C., §128, and PPM 20-8, as to the entire project, but refused to enjoin construction of the 0.8 mile segment pending such compliance. In refusing to halt construction, it noted that virtually all the right of way had been acquired, property owners relocated, all structures within the right of way razed, clearing and grubbing 80% completed and all trees removed. Much of the steel for bridges had been cut and damages from delay would have amounted to several thousand dollars daily. Paramount in this determination was a finding that through compliance with the environmental and hearing requirements, "environmental improvements may be developed which can be implemented at the already established location of this segment."

In each of these cases, the Court framed the relief in an adversary setting. Here, however, the relief which Judge Port was asked to grant had been worked out in advance and reduced to a stipulation.

Moreover, the primary areas of irreparable injury urged upon the District Court previously as grounds for granting the permanent injunction centered around the lack of a bridge at Rolling Hills Road and an allegedly dangerous intersection with Ike Dixon Road at the project's westerly terminus. These objections disappeared upon execution of the stipulation. The bridge had been a part of the original presentation at the public hearings held in 1962, but was subsequently deleted. Quite clearly, it seems, the objectives of the litigation from plaintiff's viewpoint were more nearly attained through the stipulation than through the permanent injunction as evidenced by its cooperation in drafting the stipulation and its urging modification of the injunction upon the Court.

Thus, under all the circumstances, it is submitted that the District Court's refusal to modify its prior injunction constituted an abuse of discretion.

CONCLUSION

THE ORDER APPEALED FROM
SHOULD BE REVERSED.

Dated: November 15, 1974

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF ALBANY) ss.: Camillus West Homeowner's Ass'n, Inc., v.
CITY OF ALBANY) Claude E. Brinegar, et al.

Christy Plumadore, being duly sworn, says:

I am over eighteen years of age and a Stenographer in the office of the Attorney General of the State of New York, attorney for the Defendant-Appellant herein.

On the 26th day of November 1974 I served the annexed Joint Appendix & Brief For Defendant-Appelllant upon the person & attorneys named below, by depositing two copies of the Joint Appendix & three copies of our brief thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said person & attorneys at the address es within the State respectively theretofore designated by them for that purpose as follows:

rciuoli & Covino, Esqs.
145 Seventh North Road
iverpool, New York 13088

James M. Sullivan, Jr.
United States Atty.
U.S. P. O. & Court House
Albany, New York 12201

Mr. Mark Ginder
P. O. Box 184
Camillus, New York 13031

Christy Plumadore

Sworn to before me this
26th day of November 1974

Nicholas L. Sullivan

NICHOLAS L. SULLIVAN
Notary Public, State of New York
No. 5[illegible]
Qualified in Tompkins County
Term Expires March 30, 1976